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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 72.

THOMAS L. HARTIGAN, APPELLANT,

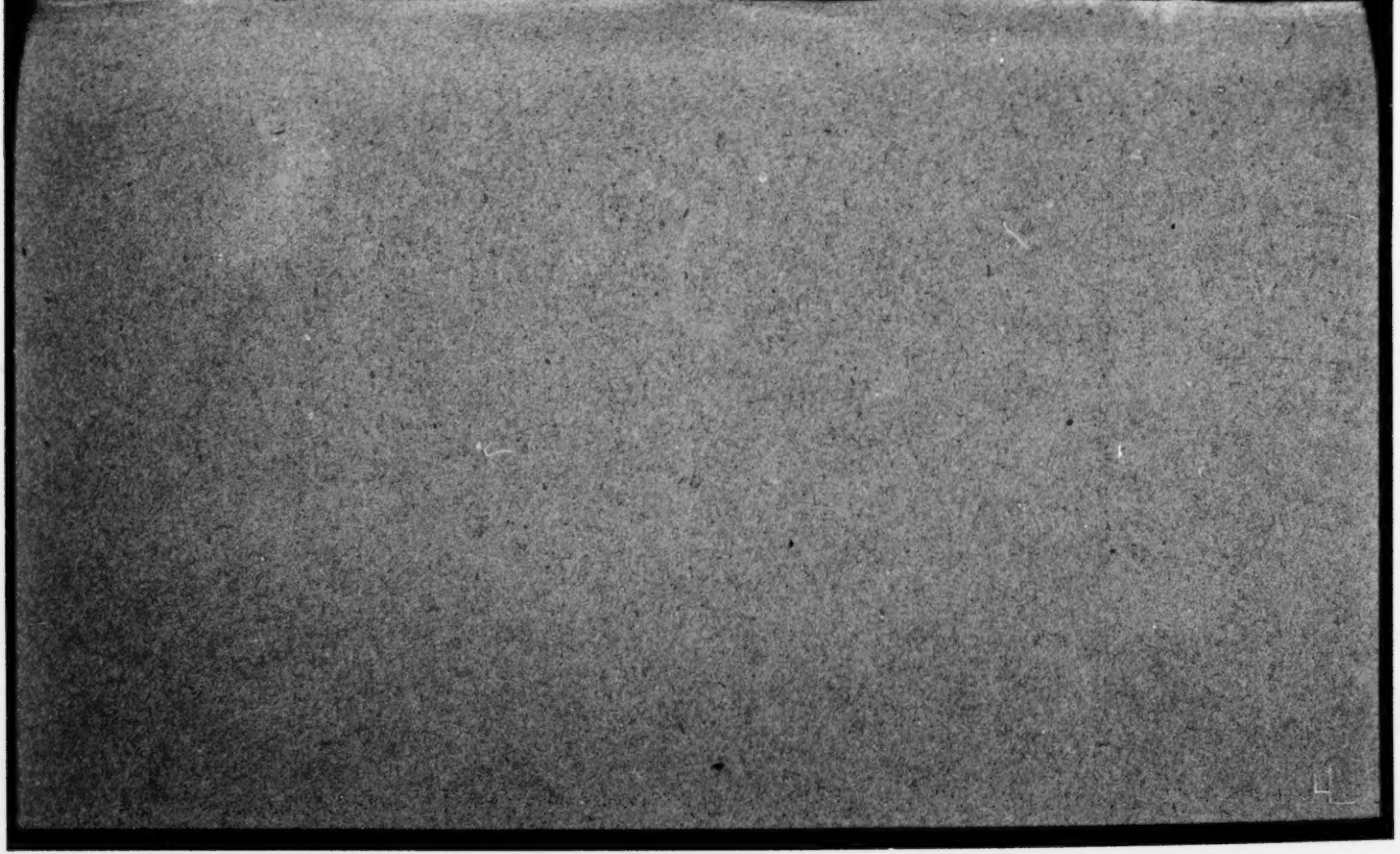
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 20, 1904.

(18,992.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1904.

1 Court of Claims.

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 16639.

I.—*Petition.*

Filed July 22, 1889. J. R.

To the honorable the Chief Justice and judges of said court:

The claimant, Thomas L. Hartigan, respectfully shows to this honorable court that in the year 1880 he was selected by the President as a candidate for admission to the United States Military Academy from the then second congressional district of the State of Illinois; that, in accordance with said selection, he reported to the superintendent of the Military Academy on the 15th day of June, 1880, and was duly thereafter examined and admitted as a conditional cadet; that after he passed satisfactorily the January examination next ensuing his admittance, he received, as is usual, his warrant of appointment as a cadet from the President, to rank as such from the first day of July, 1880.

That he remained at the Military Academy as such cadet, passing satisfactorily all intervening examinations, and meeting all the requirements of scholarship and conduct, until the 27th day of
2 July, 1883, when, being twenty-two years of age, a member of the highest class, and in the terminal year of his course, he was summarily and most unjustly dismissed from the service of the United States by order of the President on charges telegraphed and written by the superintendent of the Military Academy to the Secretary of War, the nature of which will more fully appear from the following copies of a telegram and subsequent letter:

(*Telegram.*)

WEST POINT, N. Y., *July 24th*, 1883.

Adjutant General, U. S. Army, Washington, D. C.:

On the 21st instant, about 11.30 p. m., Cadet Thomas L. Hartigan, first class, possessed himself improperly of the countersign, and personating the officer of the guard, in conjunction with other cadets, abused and maltreated a new cadet sentinel. In an investigation this morning Cadet Hartigan has three times positively disobeyed my orders under paragraph 106, Academic Regulations. I recommend that he be summarily dismissed.

(Signed) MERRITT, *Supt.*

Claimant is informed that the Secretary of War asked for the details of the offenses, and claimant states that the following communication was then forwarded:

HEADQUARTERS U. S. MILITARY ACADEMY,
WEST POINT, N. Y., *July* 25, 1883.

The adjutant general, U. S. Army, Washington, D. C.

SIR: For the information of the honorable the Secretary of
3 War, I have the honor to make the following report of the circumstances of the abuse and maltreatment of a sentinel on the night of the 21st instant, so far as the circumstances can be learned, and of Cadet Hartigan's complicity in the matter, for which his summary dismissal has been recommended:

The sentinel, a new cadet, was on post for the first time. Between ten and twelve o'clock at night he reports that a number of cadets came on his post, most of them covered so that they could not be recognized, and commenced in various ways to annoy him. Some of them were covered with sheets, personating ghosts, and some having their faces covered carried broomsticks, etc. He, while trying to do his duty as a sentinel, and drive these triflers off his post, called the corporal of the guard, and when the call was answered told the corporal of the disturbance, but the cadets who were annoying him disappeared. When the corporal had returned to the guard tents the annoyance was resumed. About this time, 11.30, a cadet, whom the sentinel recognized afterwards as Cadet Hartigan, approached the post of the sentinel, and when challenged replied, "Officer of the guard." The sentinel, as was his duty, advanced Cadet Hartigan and received from him the countersign. On this Cadet Hartigan corrected the sentinel for advancing him improperly, insisting that he had replied when challenged, "Friend with the countersign," and not "Officer of the guard." After this he talked with the sentinel, attracting his attention until 11.30, at which time, and every half hour during the night, the sentinels announce the hour, adding "All's well." As the sentinel commenced this duty
Cadet Hartigan ordered him to face from camp, and the sentinel
4 obeyed him, when he was suddenly seized from behind by one or more cadets and thrown violently into the deep ditch which surrounds Fort Clinton.

At this time officers made their appearance, and this ended the matter.

In addition to Cadet Hartigan, two other cadets were recognized by the sentinel, one of whom, Cadet Clarke, also of the first class, is not known by the sentinel to have done anything except to move around in the vicinity of the post while the sentinel was harassed. Another, Cadet Williams, of the third class, who was guilty of nothing more, so far as is known, than asking the sentinel improper questions, with a view to annoy and harass him. These last can be, under the regulations, punished by the authorities of the academy.

Cadet Hartigan, by all the evidence obtainable, is guilty of obtaining the countersign, he having no right to it; of arming himself as an officer, and answering "Officer of the guard" to a sentinel, thus making a false statement; of hazing and harassing the sentinel in various ways, and then, after directing the sentinel's attention away from himself and confederates, throwing him, or having him thrown, violently off his post into the ditch of Fort Clinton. In explanation of these charges Cadet Hartigan has refused both to the commandant and myself to make any statement.

In this same connection I would report that inquiries of all cadets seen by officers in the vicinity of the disturbance fail to show who else were guilty beside Cadet Hartigan; every cadet questioned in an investigation under paragraph 106, Academic Regulations, declining firmly but "respectfully" to answer any questions.

I therefore renew my recommendation, made by telegraph
5 yesterday, that under paragraphs 107 and 108, Academic Regulations, Cadet Hartigan be summarily dismissed from the Military Academy.

Very respectfully, your obedient servant,

(Signed) W. MERRITT,
Colonel 5th Cavalry, B'v't Major General
U. S. A., Superintendent.

Claimant received no notice of the charges made to the Secretary of War, and was wholly in ignorance of any being so made until July 28, 1883, when he was informed by the commandant of cadets that he was dismissed the service of the United States, and was given a copy of the dismissal order.

Claimant further states that annexed hereto and made a part hereof are duly certified copies of said telegram and letter, and also a letter from the War Department in response to claimant's request for copies of papers deemed needed in claimant's case, which response necessitates claimant's respectfully asking this honorable court to order requisition made to the War Department in behalf of claimant and for copies of the following papers, to wit:

Appointment of claimant as a cadet from July 1st, 1880.

Order of dismissal, dated July 27th or 28th, 1883.

And claimant further asks that when said copies are obtained, as prayed for, they may be attached hereto and made a part of the record of this case, and that this petition so amended be filed as the petition in this case.

Claimant respectfully submits and relies for relief on this general proposition, which results from the legislation of Congress, and the construction given to that legislation by the courts and judicial officers of the Government, viz:

6 *Without a finding by a general court martial the executive order of my dismissal was illegal.*

The congressional enactments sustaining this claim are as follows:

The 17th section of the act of July 13th, 1866, making appropriations for the military peace establishment provided that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of a court martial to that effect, or in commutation thereof."

14 U. S. Stat. at Large, chap. 176, sec. 5.

This section was re-enacted in 1874 in the revision of the statutes.

Rev. Stat., 1874, sec. 1229.

Rev. Stat., 1878, sec. 1229.

In the same revision article 99 of the Articles of War was enacted in the same words, except that the word "mitigation" is used instead of "commutation."

Art. 99, sec. 1342, Rev. Stat. U. S., 1874.

Art. 99, sec. 1342, Rev. Stat. U. S., 1878.

Under the construction given to this section and article of war the status of a cadet at West Point is that of an officer.

The dismissal of claimant without a trial by court martial was therefore illegal.

Claimant respectfully shows that he has persistently endeavored to have the illegal order of his dismissal revoked or declared null and void:

7 On July 29th, 1883, claimant applied to Secretary of War for relief.

On July 30th, 1883, claimant petitioned the adjutant general for relief.

On September 17th, 1883, claimant petitioned Secretary of War for relief.

In June, 1884, claimant petitioned Secretary of War for relief.

The relief asked for in all of these applications was either an examination of the evidence, a revocation of the dismissal order, a court mar*sh*al, or a court of inquiry, but every request for any form of relief was positively refused.

In April, 1888, claimant petitioned the President of the United States for relief, but is informed that no official decision has been given on this application.

Claimant is also informed and believes that after his dismissal and on his behalf a request was made by the corps of cadets and to the superintendent of the Military Academy for a trial of claimant by court mar*sh*al, and claimant is informed that said superintendent, notwithstanding the provisions of section 1326, Revised Statutes U. S., 1874, positively refused said request.

Said section is as follows, and claimant believes that the same is mandatory on the superintendent:

"The superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except the sentences of suspen-

sion and dismissal, subject to the same limitations and conditions now existing as to other general courts-martial."

Claimant's information and belief that such request was
8 made as stated is evidenced by the certificate of said corps of cadets, hereto attached and made a part of the record of this case.

The claimant deems it proper to state that he was married on the 12th day of February, 1885.

The claimant therefore respectfully prays that by this honorable court the order of his dismissal be declared null and void; that it be declared that he has never been legally separated from the army, and that judgment be rendered against the United States and in his favor for his pay as a cadet of the United States Military Academy from July 27th, 1883, to July 1st, 1889, amounting to thirty-four hundred and seventeen dollars ($3,417.00).

THOMAS L. HARTIGAN, *Claimant.*

(*Copy of Account Sued On.*)

United States in account with Thomas L. Hartigan, cadet, United States Military Academy.

To pay as cadet U. S. M. A., July 27th, 1883, to July 1st, 1885, 1 year 11 months, 4 days, at $540 a year.....	$1,041 00
To pay as cadet U. S. M. A., July 1st, 1885, to July 1st, 1889, 4 years, at $594 ($540 at 10 per cent.) a year.....	2,376 00
Total	$3,417 00

THOMAS L. HARTIGAN, *Claimant.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Thomas L. Hartigan, being duly sworn, deposes and says
9 that he is the claimant in the above-entitled cause; that he is a loyal citizen of the United States and of the State of Illinois; that he has read the above and foregoing petition and copy of account by him subscribed; that the matters and things stated therein are true, except matters and things stated on information and belief, and as to them he believes them to be true; that the telegram and letter therein contained are true copies of the certified copies herewith filed and made a part hereof; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him, and that he is justly entitled to the amount therein claimed from the United States after allowing all just credits, deductions, and offsets.

THOMAS L. HARTIGAN.

Subscribed and sworn to before me this 17th day of July, 1889.

[SEAL.] FRANK FOSTER,
Notary Public.

STATE OF ILLINOIS, }
Cook County, } ss:

I, Henry Wulff, clerk of the county court of Cook county, the same being a court of record, do hereby certify that Frank Foster, Esq., whose name is subscribed to the annexed jurat, was, at the time of signing the same, a notary public in Cook county, duly commissioned, sworn, and acting as such, and authorized to administer oaths; that I am well acquainted with his handwriting, and I verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Chicago, in the said county, this 20th day of July, 1889.

[SEAL.] HENRY WULFF, *Clerk.*

10 II.—*Traverse. Filed August* 10, 1889.

In the Court of Claims of the United States, December Term, A. D. 1888.

THOMAS L. HARTIGAN }
vs. } No. 16639.
THE UNITED STATES. }

And now comes the Attorney General on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney General.

11 III.—*Findings of Fact and Conclusion of Law. Filed March 9, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, Thomas L. Hartigan, entered the United States Military Academy as a cadet on the 1st day of July, in the year 1880, having previous to his admission as a cadet as aforesaid, to wit, on the 30th day of June, 1880, taken the following oath:

"I, Thomas L. Hartigan, of the State of Illinois, having been appointed a cadet in the Military Academy of the United States, do hereby solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted or attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.

(Signed) "THOMAS L. HARTIGAN.

"Sworn and subscribed to at West Point, New York, this thirtieth day of June, eighteen hundred and eighty, before me.

[SEAL.] (Signed) "WM. WARD,
"*Notary Public.*"

12 II.

The claimant, after having passed his first semiannual examination, received the following certificate of appointment:

"To all whom it may concern:

"Know ye, that the President has been pleased to appoint Thomas Leonard Hartigan a cadet of the United States Military Academy, to rank as such from the 1st day of July, 1880.

"Given under my hand and seal at the War Department this tenth day of February, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

"ALEX. RAMSEY,
"*Secretary of War.*

"R. C. DRUM,
"*Adjutant-General.*"

And on the 12th of February, 1881, he entered into the following contract with the defendants:

"UNITED STATES MILITARY ACADEMY.

"I, Thomas Leonard Hartigan, of the State of Illinois, aged nineteen years one month, having been selected for appointment as a cadet in the Military Academy of the United States, do hereby engage, with the consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority. And I, Thomas Leonard Hartigan, do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States paramount to any and all allegiance, sovereignty, or fealty I may owe to any State, county, or country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States."

III.

The said claimant served as a cadet as aforesaid from the 1st day of July, 1880, until the 27th of July, 1883, on which day he was summarily dismissed from the Military Academy, by order of the President, upon the charges of maltreating a new cadet upon guard, personating an officer of the guard, making an improper use of the countersign, and disobedience of orders.

IV.

After the dismissal, on July 27, 1883, of the claimant, George William Kirkman was appointed a cadet at the United States Military Academy, from the third congressional district of Illinois, on June 15, 1884, to succeed the said claimant, and that the said George William Kirkman was graduated from the academy and appointed during a recess of the Senate to be second lieutenant in the First regiment of infantry, United States Army, June 12, 1889; and that
he was nominated to the Senate December 16, 1889, for the
13 appointment of second lieutenant, dating from June 12, 1889;
that the nomination was confirmed by the Senate December
20, 1889, and that he was commissioned by the President, accord-

ingly, January 7, 1890, to rank from June 12, 1889; and that the said George William Kirkman is now a captain in the Twenty-fifth regiment of infantry, United States Army.

V.

Sometime between July 27, 1883, the date of claimant's dismissal from the United States Military Academy, and March 5, 1888, the date of claimant's first petition to the President, the said claimant intermarried with some person whose name is not shown by the record.

VI.

The claimant, July 30, 1883, addressed a statement and petition to the Adjutant-General of the Army, requesting reinstatement, or a trial by court-martial, and on the 3d day of August following he addressed a petition to the Secretary of War requesting reinstatement. The statements and requests so made by the claimant asserted his innocence of the charges made against him, but the statements were not verified. April 21, 1888, the claimant, through the Secretary of War and by the hand of Senator Shelby M. Cullom, presented a petition to the President of the United States asking for a revocation of the order of his dismissal, and the issuing of an order for his trial before a court-martial, and an order assigning and appointing him in the army as of the date of the assignment of the lowest graduate of his class. All these petitions and requests were denied.

VII.

The salary of a cadet at the time the claimant was dismissed was $540 a year, which for 6 years would amount to $3,240. That $4 a month is held back from a cadet under the regulations of the academy for the benefit of the equipment fund. That amount for three years would be $144, making the total amount claimed as due to the claimant $3,096, none of which has been paid to him.

Conclusion of Law.

Upon the foregoing findings of facts the court decides, as a conclusion of law, that the claimant can not recover, and his petition should be dismissed.

14 IV.—*Opinion of the Court.*

WRIGHT, *J.*, delivered the opinion of the court:

The claimant having been appointed by the President, July 11, 1880, a cadet in the Military Academy, served as such until July 27, 1883, when he was summarily dismissed by order of the President,

upon charges of maltreating a new cadet while the latter was performing guard duty, personating an officer of the guard, improper use of the countersign, and disobedience to orders. Subsequent to his dismissal a successor was appointed to the place so vacated, who afterwards graduated from the academy, and was later, by and with the advice and consent of the Senate, appointed a second lieutenant in the army, and this suit is brought to obtain the decree of this court, declaring the order of dismissal null and void, and for a judgment against the United States for $3,417, the pay of a cadet from July 27, 1883, to July 1, 1889.

The question presented for our decision is whether the President may summarily so dismiss a cadet without first obtaining the sentence of a court-martial under the provisions of the statutes, Articles of War, and Army Regulations, by which the military establishment of the United States is governed.

The contention of the claimant is that the provisions of sections 1229 and 1342 of the Revised Statutes is a limitation upon the powers of the President in such cases, wherein it is enacted, in effect, that no officer shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial. By article 99, section 1342, above referred to, it is declared that the word "officer," as used by the legislative department, shall be understood to designate commissioned officers; the word "soldier" shall be understood to include noncommissioned officers, musicians, artificers and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by courts-martial.

We are referred to Babbitt *v.* The United States (16 C. Cls. R., 202) as establishing the status of a cadet to be that of an *uncommissioned* officer, and from that it is argued that the cadet therefore, being an officer, falls within the prohibition of dismissal without the sentence of a court-martial. The effect, however, of that decision, carried to its logical sequence, would result in the conclusion that a cadet is not an officer within the meaning of the legislation referred to, because he is uncommissioned. The decision in the case of Morton *v.* United States (19 C. Cls. R., 200) is also referred to, to sustain the insistence that the term of a cadet is to be considered as part of the service in the army in determining the right of an officer to longevity pay; but there the nature of the duties of a cadet was distinctly differentiated from that of ordinary soldiers. That a cadet is in some kind of service—has duties to perform under orders of superiors—is not to be questioned by anyone who knows anything about the work, physical and mental, that he has to do and the character of military authority and discipline to which he is subject. No private soldier is more in service than a cadet, though the character of the two services are quite different. The statute (sec. 1322) prescribes the rights and duties of cadets. They shall be arranged into companies according to the directions of the superintendent, each of which shall be commanded by an officer of

the army, for the purpose of military instruction. To each company shall be added four musicians. The corps shall be taught and trained in all duties of a private soldier, noncommissioned officer, and officer; shall be encamped at least three months in each year, and shall be taught and trained in all duties incident to a regular camp, and (sec. 1323) shall be subject at all times to do duty in such places and on such service as the President may direct.

It therefore seems plain to us, by reference to the statutory provisions above recited, what the rights and duties of a cadet consist of, and the nature of the same, consisting merely in such as are included in and incident to military instruction, drill and discipline, and training in such as appertain to the duties of a private soldier, noncommissioned officer, and officer. It is true they are subject at all times to duty in such places and such service as the President may direct, but, following the general rule by which statutes are construed, this general power of the President to assign to duty in such places and services as he may direct would be controlled by the previous specific description of the nature of such duties and services, and such duties would therefore fall in the specific class of those relating to instruction, drill, and discipline. It is not therefore believed the President, under that section of the statute, would assume to assign duty to cadets requiring them to participate in actual war, although, by virtue of the powers given by the Constitution to the Commander in Chief, he has repeatedly assigned cadets, both army and navy, to active military operations beyond the confines of the academy.

Hence, if our reasoning is sound (and upon this point we feel assured) the rights and duties of a cadet are not the same as those of privates, noncommissioned officers, and officers, but at the same time the cadets are serving in the army and are part of the regular establishment, and may, we think, be described as candidates merely for commissioned officers, and therefore do not fall within the prohibition of the statute forbidding dismissal in times of peace unless in conformity with the sentence of a court-martial. These appointments are made by the President, without the advice and consent of the Senate, and it seems to us plain that Congress did not intend by any legislation that has been enacted to withhold from him the power of summary dismissal for the good of the academy, for such a power can wisely be left to his discretion. In truth, when sections 1325 and 1326 of the Revised Statutes are considered together, it would seem that the intention of Congress was to reserve the power of summary dismissal to some one in authority. And who more properly and wisely than the President could administer such authority? By section 1325 it is provided that no cadet who is reported as deficient in either conduct or studies, and recommended to be discharged from the academy shall, unless upon recommendation of the academic board, be returned or appointed to any place in the army before his class shall have left the academy and received their commissions. It is clear from the record here that claimant

was deficient in conduct, for which he was dismissed, and, as we think, in conformity to the law we have recited. By the other section of the statute above numbered the superintendent of the academy is given power to convene general courts-martial for the trial of cadets and to execute the sentences of such courts, except sentences of suspension and dismission; and the latter exception we think is reserved for the President, who is not limited in his authority by the provision of the section.

Without such power of summary dismissal being vested somewhere in the conduct and management of colleges, and such is the academy in its nature, we think it within the observation of everyone, the lack of proper discipline and deportment would be the common fault of all and thereby greatly lessen the value and efficiency of such institutions. We can not believe, therefore, that it was the intention of Congress to withhold from the Executive this most salutary and effective means of enforcing order and discipline, common to all institutions of learning throughout the land.

It follows from the views we have expressed that claimant is not entitled to the relief and judgment that he seeks, and his petition will be dismissed.

16 V.—*Judgment of the Court.*

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 16639.

At a Court of Claims held in the city of Washington on the 9th day of March A. D. 1903 judgment was ordered to be entered as follows:

The court on due consideration finds for the defendants and do order, adjudge and decree that the petition of the claimant Thomas L. Hartigan be dismissed.

BY THE COURT.

17 VI.—*Application for and Allowance of Appeal.*

THOMAS L. HARTIGAN
v.
THE UNITED STATES. } No. 16639.

The claimant above named hereby makes application for an appeal to the Supreme Court of the United States from the judgment of this court, rendered March 9th, 1903, dismissing his petition. The claimant assigns as error the conclusion of law which the court reached and the judgment of the court dismissing his petition. The claimant is advised, and therefore assigns, that the court on the

facts found should have reached an opposite conclusion of law and should have rendered judgment for the claimant in the sum of three thousand, two hundred and forty dollars ($3,240).

For the reasons above stated the claimant asks that this, his application for appeal, be allowed and a transcript of the pleadings in the case and of the final judgment be made and duly certified.

THOMAS L. HARTIGAN,
By DUDLEY AND MICHENER,
His Attorneys of Record.

Filed May 5, 1903.

JUNE 1, 1903.

Ordered that the foregoing application for appeal to the Supreme Court of the United States be allowed as prayed for.

BY THE COURT.

18 Court of Claims.

THOMAS L. HARTIGAN
vs.
THE UNITED STATES. } No. 16639.

I, John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 10th day of June A. D. 1903.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,992. Court of Claims. Term No. 72. Thomas L. Hartigan, appellant, *vs.* The United States. Filed June 29th, 1903. File No. 18,992.